



Canada-United States Law Journal

Volume 25 | Issue

Article 49

January 1999

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Ronald G. Atkey

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Recommended Citation

Ronald G. Atkey, *Technological Change and Canada/U.S. Regulatory Models for Information, Communications, and Entertainment*, 25 Can.-U.S. L.J. 359 (1999)
Available at: <https://scholarlycommons.law.case.edu/cuslj/vol25/iss/49>

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TECHNOLOGICAL CHANGE AND CANADA/U.S. REGULATORY MODELS FOR INFORMATION, COMMUNICATIONS, AND ENTERTAINMENT

*Ronald G. Atkey, P.C., Q.C.**

I. INTRODUCTION

The task assigned to Bonnie Richardson and me this evening is a daunting one. Not only must we sweep across the broad domain of the information, communications, and entertainment industries, but we must also at least touch on the regulatory and institutional models used on both sides of the border, commenting on their efficacy in this era of fast-moving technological change. Hopefully, you will forgive us if we are less than comprehensive in our approach.

For my part, I intend to review briefly the regulatory approaches currently applicable to the information, communications, and entertainment industries in Canada. I will then proceed anecdotally with recent examples from each industry to demonstrate that no matter how well-intentioned or aggressive the regulatory technique, technological change is spawning real life situations which make any attempts at new forms of regulation irrelevant at best and counterproductive at worst. My recent examples are not necessarily Canadian, which is quite in keeping with the cross-border nature of these industries. Indeed, I suspect there is a certain sameness of approach between Canada and the United States in regulating the information and communications industries. This is not the case, of course, in the entertainment industry, where Canadian policies, past and present, have led to aggressive regulatory models, particularly relating to content and ownership. We even use different nomenclature. In the United States, you call it "the entertainment business." In Canada, we call it "cultural industries."

Notwithstanding these differences of approach, Bonnie Richardson and I may not be far apart when assessing the impact of technological change in the entertainment field and the effectiveness of various regulatory approaches. To avoid duplication and overlap, she will focus on the film and television industries which she knows best. I will touch on the music and

* Mr. Atkey is a Senior Partner of Osler, Hoskin & Harcourt, one of Canada's largest law firms. He is also a member of the Board of Trustees of the Motion Picture Foundation of Canada.

publishing industries, which have their own set of unique opportunities and problems in the Canada-U.S. context.

What kind of technological change are we really dealing with this evening? Essentially, it is the impact of the Internet, nothing more, nothing less. I could not even begin to attempt another definition. Our own Canadian Radio-television and Telecommunications Commission (CRTC) tried to develop a working description of "new media" as part of its call for comments prior to public hearings held a few months ago to consider, essentially, whether the Internet should or could be regulated.

New media can be described as encompassing, singly or in combination, and whether interactive or not, services and products that make use of video, audio, graphics, and alphanumeric text; and involving, along with other, more traditional means of distribution, digital delivery over networks interconnected on a local or global scale.¹

This valiant definitional attempt was quickly attacked from both sides – it was called overly broad as a subtle means of extending the CRTC's jurisdiction, and overly narrow resulting in important omissions and lack of clarity. This is not the type of analysis I intend to pursue this evening.

Rather, I would simply echo what many others at this conference have been saying. The Internet has become pervasive in our North American society. Whether one is seeking quick access to information, sending e-mails, or being entertained, the Internet has become an important part of day-to-day living in many Canadian and U.S. homes. In Canada, the Canadian Association of Broadcasters estimates that within two years, about five million households, or forty percent of total households, will be on the Internet.² In the United States, simply multiply this by ten. Even these estimates may be conservative. Certainly the North American stock markets think so. Share prices of Internet service providers are rocketing to new highs on an almost daily basis. One of the attractive features of the Internet for consumers, apart from accessibility, speed, and low cost, is the perception that it is unregulated and, therefore, liberating. Whether or not this remains true in the face of regulatory policy initiatives in both Canada and the United States, what is

¹ Canadian Radio-television and Telecommunications Commission, *New Media – Call for Comments*, Broadcasting Public Notice CRTC 1998-82, Telecom Public Notice CRTC 98-20, Ottawa, July 31, 1998, issued pursuant to Order in Council P.C. 1994-1689, Oct. 11, 1994., para. 6 [hereinafter *Call for Comments*]. Many of the respondents' submissions are available on the CRTC Web site. See <http://www.crtc.gc.ca/ENG/Proc_br/Broad-e.htm> (visited Aug. 18, 1999).

² See Statistics Canada, *The Daily, Internet Use By Households*, 1998, Thurs., July 15, 1999 (visited Aug. 17, 1999) <<http://www.StatCan.CA/Daily/English/990715/d990715a.htm>>.

clear is that the technological development of the Internet is currently way out in front of the regulatory process. The momentum sparked by corporate innovation in the private sector is unstoppable. The only regulatory approaches that may work will be those that enhance productivity involving Internet use, not those which limit or restrict Internet use. The only consensus favoring limitation or restrictions relates to offensive content such as hate propaganda, pornography, and consumer fraud. With that somewhat cynical view of the likely effectiveness of regulation of the Internet, let me briefly review some of the regulatory approaches utilized in Canada.

II. REGULATORY APPROACHES

At risk of oversimplification, there are perhaps seven current regulatory approaches in Canada that might be adapted to the Internet: financial incentives; content requirements; tax measures; foreign investment restrictions; competition/anti-trust measures; intellectual property tools; and securities trading. This list is not exhaustive. Nor does the inclusion of a particular regulatory approach in my list necessarily imply that it should or can be employed to regulate the Internet.

A. Financial Incentives

The Canadian entertainment industry has enjoyed strong financial support from both the federal and provincial governments. The policy rationale for this support is that viable entertainment products are extremely expensive, and many Canadian entertainment firms are small and do not have ready access to capital. If Canadians are to preserve their cultural distinctiveness living alongside the U.S. giant, governments must use policy tools such as financial incentives to maintain a place for Canadian cultural products in the Canadian market and thereby, give Canadians ready access to their own culture. Over the years, this Canadian policy approach has resulted in direct financial support to book publishing (involving Canadian authors and publishers);³ the sound recording industry (involving Canadian music products);⁴

³ See National Library of Canada, *Publishing Support Programs from the Government of Canada* (visited Aug. 17, 1999) <<http://www.nlc-bnc.ca/window/support/supporte.htm>>. See also Communications Canada Fact Sheet FS-92-3808E *Investment Canada Act, Revised Foreign Investment Policy in Book Publishing and Distribution* (visited Aug. 17, 1999) <http://investcan.ic.gc.ca/en_doc_b.htm> (providing information on foreign investments in the Canadian book publishing and distribution sector).

⁴ See Canadian Heritage, *Programs – Music* (visited Aug. 17, 1999) <http://www.pch.gc.ca/culture/cult_ind/progs/music.htm> (providing links to information on the Canadian government's programs to support the Canadian sound recording industry).

production of feature films and television production;⁵ development of new media and multimedia products;⁶ and postal subsidies to Canadian periodicals.⁷ On top of all this, the Canadian government provides close to one billion dollars each year to support radio and television programming through one of Canada's most important cultural policy instruments, the Canadian Broadcasting Corporation.

B. Content Requirements

Canada has rigorously enforced content requirements for sound recordings played on radio and programs broadcast on television. The policy rationale is not to limit access to foreign cultural goods, but rather to ensure that Canadians can experience their own cultural products and that there is shelf space for them in the market. The CRTC is the primary regulator in this area, establishing and applying rules for radio and television programming services that broadcast programs, and for the various distribution systems such as cable, direct-to-home (DTH), satellite, and multipoint distribution systems (MDS) that deliver broadcast services to homes.

Let me give you some practical examples. When playing music on Canadian radio, commercial radio station operators are generally required to devote thirty-five percent or more of their popular music selections to Canadian selections.⁸ The determination of a Canadian selection is based on the so-called MAPL system – the nationality of the Music composer, the Artist, the place of Production, and the author of the Lyrics.⁹ If at least two of the four components are Canadian, then the record meets requirements for Canadian content and counts towards the thirty-five percent.¹⁰ As you might conclude, most popular music radio stations these days in Canada are having little difficulty meeting this threshold requirement of thirty-five percent, giving air-

⁵ See Canadian Heritage, *Programs – Television & Radio* (visited Aug. 17, 1999) <<http://www.pch.gc.ca/culture/brdcstng/tv-radio.htm>> (providing links to information on the Canadian government's programs to support the Canadian television and radio industries); Canadian Heritage, *Programs – Film & Video* (visited Aug. 17, 1999) <http://www.pch.gc.ca/culture/cult_ind/progs/film-video.htm> (providing links to information on the Canadian government's programs to support the Canadian film and video industries).

⁶ See Canadian Heritage, *Programs – Multimedia* (visited Aug. 17, 1999) <<http://www.pch.gc.ca/culture/brdcstng/multimedia.htm>> (providing links to information on the Canadian government's programs to support Canadian efforts to develop new multimedia products).

⁷ See Canadian Heritage, *Publications Assistance Program* (visited Aug. 17, 1999) <http://www.pch.gc.ca/culture/cult_ind/pap/english.htm> (providing information on the Canadian government's postal subsidies for Canadian periodicals).

⁸ See *Broadcasting Act*, R.S.C. 1986, c. 948, s. 2.2(6)(a).

⁹ See *id.*, s. 2.2(2).

¹⁰ See *id.*

play to Celine Dion, Shania Twain, Alannis Morissette, k.d. lang, and Bare-naked Ladies – Canadians all.

Yearly, private television broadcasters must achieve sixty percent Canadian content overall and fifty percent from 6:00 p.m. to midnight.¹¹ With pay and specialty television services, the requirement is less, usually around thirty percent depending on the licensee. For television programs and feature films on television, Canadian content is based on a point system. Programs can earn two points for using a Canadian director and one point for each leading Canadian actor. Programs must be produced by a Canadian and have at least six points to be considered Canadian. To qualify for financial assistance, a television production must obtain a minimum of ten points.¹²

While we have convergence leading to more direct competition between the broadcast and communications industries in Canada, the regulatory distinction between broadcast and telecom services will continue for a while. For example, when a telecom in Canada provides broadcasting services, these will fall under the Broadcasting Act and its regulations. Similarly, when a cable television company provides telecommunications services, they will fall under the Telecommunications Act and its regulations. Fortunately in Canada, the regulator under both acts is the CRTC, resulting in some coordination of regulatory approach.¹³

Content requirements also underlie the simultaneous substitution rules that apply in the television industry. This permits the substitution of a Canadian signal for an American signal for commercials during a network program purchased by a local licensee.¹⁴ The cable company implements the commercial substitution at the request of the local Canadian broadcaster, to preserve the integrity of their advertising revenue base underlying the local licence.¹⁵ The practical result of this is that during such important programs as the Super Bowl or *E.R.*,¹⁶ most Canadians miss the U.S. ads and receive only the local substitute.

Another form of content requirement, of course, is existing CRTC policies flowing from federal laws respecting “offensive” content such as hate propaganda or pornography. To date, the CRTC has been the principal regu-

¹¹ See *id.*, c. 949, s. 4(6)-4(7).

¹² See Canadian Content and Certification Guidelines (visited Aug. 17, 1999) <<http://www.bcfilm.com/gate/VISITORS/GOVERNMENT/CERTIFICATION.HTM>>.

¹³ See *Telecommunications Act*, R.S.C. 1998, c. 38, ss. 8-15; *Broadcasting Act*, *supra* note 8, c. B-9.01, ss. 5-34.

¹⁴ See Canadian Radio-television and Telecommunications Commission, *Broadcasting Distribution Regulations*, § 30 (visited Aug. 17, 1999) <<http://www.crtc.gc.ca/eng/legal/bdue.htm>>.

¹⁵ See *id.* § 30(2).

¹⁶ *E.R.* (NBC television program).

lator, at the request of consumer groups and law enforcement authorities. At the CRTC new media hearings held a few months ago, opinion was divided between introducing new measures to address "offensive content" on the Internet, or allowing existing laws and self-regulatory measures by Internet service providers to offer protection for consumers.¹⁷

C. Tax Measures

Canada has many film and television tax incentives. For example, the Canadian Film or Video Production Tax Credit program is designed to encourage a more stable financing environment and longer-term corporate development for Canadian-owned production companies.¹⁸ A similar program, the Production Services Tax Credit program, is available to non-Canadian companies.¹⁹ Provincial governments have followed suit, offering complementary tax credit programs which are thriving in major film production locales such as Toronto, Vancouver, and Montreal, as well as some of the smaller provinces like Nova Scotia, Manitoba, and Saskatchewan.

Another form of indirect tax is the CRTC requirement that cable companies, DTH providers, and other broadcasting distribution undertakings contribute up to five percent of their gross annual revenues to the Canadian Television Fund, which supports the production and distribution of Canadian drama, children's programming, documentaries, and performing arts and variety shows.

To assist Canadian newspapers and magazines, the Canadian government in 1965 introduced section 19 of the Income Tax Act. This effectively eliminates the tax deduction, as a normal business expense, for any Canadian advertiser placing advertisements in a non-Canadian magazine. A Canadian magazine is defined under this measure as one with seventy-five percent Canadian ownership and eighty percent original content.²⁰ A similar measure was introduced applicable to broadcasting with the prospect of cable and U.S. television signals entering Canada and the likely shifting of advertising

¹⁷ See Transcript of Proceedings for the Canadian Radio-television and Telecommunications Commission: Final Phase of the Public Hearing Examining New Media (visited Aug. 17, 1999) <<http://www.crtc.gc.ca/fm/proc%5Fbr/transcripts/1999/t080299.htm>>.

¹⁸ See Canadian Heritage, *Canadian Film or Video Production Tax Credit* (visited Aug. 17, 1999) <http://www.pch.gc.ca/culture/cult_ind/cavco-bcpac/fv-produce-e.htm>.

¹⁹ See Canadian Heritage, *Film or Video Production Services Tax Credit* (visited Aug. 17, 1999) <http://www.pch.gc.ca/culture/cult_ind/cavco-bcpac/fv-serv-e.htm>.

²⁰ See *Income Tax Act*, R.S.C. 1952, s. 19.

revenues from Canadian stations to U.S. stations immediately across the border.²¹

While these provisions for non-deductibility under the Income Tax Act have already been of immense value to the growth and development of the Canadian magazine, newspaper, and domestic television industry, the Canadian government in 1995 sought to ratchet up its protectionist measures as applied to split-run magazines, introducing an eighty percent excise tax on advertising in split-run magazines. This was challenged successfully by the U.S. Trade Representative (USTR) at the World Trade Organization in 1997,²² and the measure was repealed in October 1998.²³ However, a new measure, Bill C-55, was introduced at about the same time which would effectively prohibit, through criminal sanctions, foreign publishers from selling advertising services directed at the Canadian market to Canadian advertisers.²⁴ This legislation has attracted some controversy on both sides of the border including threatened trade retaliation from the United States. The bill is currently stalled before the Canadian Senate while U.S and Canadian trade negotiators attempt to come up with acceptable alternatives.

D. Foreign Investment Restrictions

In Canada, federal government policy directives, as applied by the CRTC, in general terms restrict foreign ownership levels for both broadcasting licensees and telecommunications carriers to a maximum of 46.7% (33.3% of the voting shares of a holding company and twenty percent of the voting shares of the licensee).²⁵ While theoretically one hundred percent of a broadcaster's or telco's non-voting shares could be foreign-owned, there are regulatory restrictions on the exercise of de facto control by non-Canadians.

In the film and book publishing industries, foreign investment restrictions are set essentially by government policy and administered through the provisions of the Investment Canada Act, which provides for almost automatic review of any investment in a cultural industry.²⁶ This includes books, maga-

²¹ See Bill C-32, *An Act to amend the Copyright Act*, 2d Sess., 35th Parl., 1997 (assented to 25 April 1997).

²² See Canada – Certain Measures Concerning Periodicals, Panel Report, WT/DS31/R, Mar. 14, 1997; Report of the Appellate Body, WT/DS31/AB/R, June 30, 1997.

²³ See Lisa Schlein, *Canada to Drop Trade Barriers*, TORONTO STAR, Sept. 23, 1998, at A7.

²⁴ See Bill C-55, *An Act respecting advertising services supplied by foreign periodical publishers*, 1st Sess., 36th Parl., 1998 (1st reading 8 Oct. 1998), s. 3.

²⁵ See Canadian Radio-television and Telecommunications Commission, *Ownership and Control of Canadian Telecommunications Common Carriers Regulations*, §§ 18-27 (visited Aug. 17, 1999) <<http://www.crtc.gc.ca/ENG/LEGAL/OWNERE.HTM>>.

²⁶ See *Investment Canada Act*, R.S.C. 1985, c. I-21.8, s. 14.

zines, periodicals, or newspapers; films or videos; music recordings and sheet music; and radio, television, cable, and satellite programming.²⁷ Foreign investors are prohibited from acquiring control of Canadian-owned book sellers or publishers, and are permitted to acquire existing foreign-owned publishers only upon demonstrating net benefit to Canada, usually involving undertakings to protect Canadian authors, editors, and distribution.²⁸ In film, foreign investors are prohibited from acquiring Canadian-controlled distribution firms and are allowed to acquire other non-Canadian firms only when they agree to invest a portion of their Canadian earnings in developing Canadian culture.²⁹ New foreign Canadian film businesses are only allowed to distribute their "proprietary" products, i.e., films for which they hold world rights or are a major investor.³⁰

Regarding magazines and newspapers, a combination of government policy and section 19 of the Income Tax Act results in foreign investors being restricted to twenty-five percent of voting shares. This is one of the subjects currently being negotiated by Canada and U.S. trade officials in their attempt to resolve outstanding issues respecting Bill C-55 applicable to magazines.

E. Competition and Anti-trust Matters

In Canada, competition issues respecting the communications and broadcasting industries are addressed by both the Bureau of Competition Policy under the Competition Act³¹ and by the CRTC under both the Telecommunications Act³² and the Broadcasting Act.³³ Relations between the two agencies are surprisingly good, with the Bureau taking the lead on mergers in the telecom field (with the CRTC forbearing), and the CRTC taking the clear lead in the broadcasting, cable, and DTH fields.

Ironically, it was the CRTC which introduced competition in the communications industry when in 1992 it sanctioned the introduction of long-distance competition effectively breaking up Bell Canada's monopoly carried

²⁷ See *id.*, s. 14.1(6).

²⁸ See *id.*, s. 16(1).

²⁹ See Investment Canada, *The Canadian Film Industry and Investment Canada*, Communications Canada Fact Sheet FS-88-3844E (visited Aug. 17, 1999) <http://investcan.ic.gc.ca/en_film.htm>.

³⁰ See *id.*

³¹ See Competition Act, R.S.C. 1985, c. C-34, s.1; R.S.C. 1985, c. 19 (2d supp.), s. 19.

³² See Telecommunications Act, *supra* note 13; c. 38, ss. 8-15.

³³ See Broadcasting Act, *supra* note 8, c. B-9.01, ss. 5-34.

out in cooperation with regional players.³⁴ What emerged over the ensuing seven-year period were four major players: Bell Canada (with U.S.-based Ameritech owning twenty percent); BCT.Telus Communications (with U.S.-based GTE owning twenty-seven percent); AT&T Canada (with U.S.-based AT&T Corp. owning thirty-one percent); and Call-Net Enterprises (with U.S.-based Sprint owning twenty-five percent). Regarding wireless communications (regulated under the Radiocommunications Act³⁵), Canada now has four major competitors: Bell Mobility, Rogers Cantel, Clearnet Communications, and Microcell Telecommunications. The fast-growing consolidation among Internet service providers on both sides of the border coupled with the fallout from the anticipated decision of the U.S. District Court in the Microsoft case will provide a challenge for competition and anti-trust laws for many years to come.³⁶

F. Intellectual Property Tools

Canada and the United States have long offered copyright protection for their authors, composers, and lyricists to ensure that they receive appropriate rights or remuneration for creativity. This common legislative approach is immensely important to future regulatory attempts to protect intellectual property on the Internet. Canada expanded its copyright protection in 1997 through provisions for neighbouring rights which extends copyright protection in the sound recording industry from authors and producers to performers.³⁷ Under this regime, when sound recordings are broadcast on radio or played in public, the author, producer, and performer will now all receive royalties under a pre-determined tariff.³⁸

Further reforms introduced in 1997 involve a private copying levy on blank audio recording media covering both analog and digital recording media and CD-ROMs.³⁹ Revenue from this private copying scheme (the tariff for which has not yet been established, but is thought to be in the order of one or two dollars per blank tape)⁴⁰ will be used to compensate Canadian authors, music publishers, performers, and producers for the unauthorized copying of their sound recordings. Canada will also compensate foreign

³⁴ See British Columbia Library Association Information Policy Committee, *CRTC and Telephone De-Regulation* (visited June 30, 1999) <<http://vcn.bc.ca/bcla-ip/teleco97.html>>.

³⁵ See Radiocommunications Act, R.S.C. 1985, c. R-2, s. 1; 1989, c. 17, s. 2.

³⁶ See *U.S. v. Microsoft Corp.*, No. 98-1232 (D. D.C. filed May 18, 1998).

³⁷ See Bill C-32, *supra* note 21, ch. 24, s. 30.9, 1997 S.C. 42 (Can.).

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ Roy Bailey, M.P. (Souris – Moose Mountain, Reform) 1st Sess. 36th Parl. (1998), *Hansard*, pp. 9567-68 (145:1150).

authors of musical works whose copyright exists in Canada. This will be done only on a reciprocal basis (i.e., only to creators whose countries reciprocate and offer the same benefits to Canadian creators abroad).⁴¹ Significantly, U.S. creators will be excluded from this benefit, at least for the moment. This has attracted negative comment from the U.S. Trade Representative's National Trade Estimate, which contains the following excerpts:

The United States has expressed concerns to Canada because Bill C-32 potentially denies U.S. copyright holders certain broadcast rights and blank tape levy payments. These payments technically are supposed to be collected and distributed to Canadian copyright holders and to other copyright holders who are members of the Rome Convention. Under Bill C-32's provisions affecting "neighboring rights" and recording media, U.S. performers and producers will be denied proceeds, which is a denial of national treatment to U.S. copyright holders. The USTR announced on April 30, 1997, that due to these provisions, Canada was placed on the Special 301 Watch List, where it remained as of early 1999.

On September 1, 1997 the neighboring rights sections of the legislation were promulgated, and on January 1, 1999 the recorded media sections were promulgated. However, Canada has yet to determine the size of the levy payments for either section, and while both are legally in effect, neither neighbouring rights fees nor recorded media levies have been implemented. The two governments are exploring mechanisms that would grant U.S. copyright holders equal treatment. The USTR remains concerned by Canada's denial of national treatment of U.S. companies and artists, and will continue to monitor Canada's implementation of the law.⁴²

Regarding book distribution, the Canadian government in 1997 amended the Copyright Act to prevent parallel importation.⁴³ This is to cover situations where Canadian publishers or distributors have the exclusive right to distribute certain titles in Canada, but are undermined through parallel importation from a foreign source (usually the United States).

⁴¹ *See id.*

⁴² U.S. TRADE REPRESENTATIVE, 1999 NATIONAL TRADE ESTIMATE 40 (1999)

⁴³ *See* Bill C-32, *supra* note 21, at s. 27.1.

G. Securities Trading

Stock markets in both the United States and Canada have always been influenced by rumours and the fast flow of unsubstantiated information. But with a huge increase in direct on-line trading and the prospect of Web site chat rooms quickly generating coordinated buying or selling activity, stock prices can be affected in very short order. Investigators at the Securities and Exchange Commission in New York and at the Ontario Securities Commission in Toronto are faced with a regulatory challenge of huge proportions. Whether this can be approached through existing regulatory tools dealing with securities fraud, wire fraud, or insider trading or whether new regulatory tools are required remains to be seen.

III. REGULATING THE INTERNET: SOME CASE STUDIES TO DEMONSTRATE THE DILEMMA

A. Chat Rooms, Cyberrumours, and Stock Prices

Last week, a financial message board on Yahoo.com noted that the Nasdaq-listed California-based communications equipment manufacturer called PairGain Technologies Inc. was about to be acquired by ECI Telecom of Israel for approximately \$1.35 billion. An electronic link was provided to a Web site identified as "Bloomberg.com" which contained a detailed article about the PairGain/ECI transaction. Everything about the Bloomberg site, right down to the background colour and the banner advertisement, looked authentic.⁴⁴

PairGain shares jumped thirty-two percent on trading volume, almost seven times the daily average. It was several hours before Bloomberg issued a press release saying that this story was a hoax. After another day or two of trading, the shares receded to their normal level, but it was clear that the interval of over two hours left a huge opportunity for day traders to get in and out of the market. By week's end, PairGain and Bloomberg officials had turned the matter over to investigators from the Securities and Exchange Commission (SEC).⁴⁵

Consider also the case of the stock chat room that can be accessed through trading-places.net, which was profiled in the *Wall Street Journal* in

⁴⁴ See Tom Lowry, *PairGain Employee Pleads Guilty in Securities Case*, USA TODAY, June 22, 1999, at 2B; Ian Karleff, "Electronic Graffiti" Leaves Its Mark, FIN. POST, May 8, 1999, at D8.

⁴⁵ See Karleff, *supra* note 44.

mid-March.⁴⁶ Chat room members pay \$279 per month to belong to the site's "Trading Desk," which gains them access to stock recommendations and permits them to chime in with their own comments. The founder of trading-places.net has been contacted by the SEC's Enforcement Division and asked for more information about the Web site's financial agreements with brokerage firms, particularly those that advertise or are recommended on its Web site.⁴⁷

Should these Web sites or chat rooms be restricted or closed down by the regulators? Can the wrongdoers even be identified?

B. Merger Mania in the U.S. Cable Industry

With the imminent acquisition by Comcast Corp. of MediaOne Group, it now seems that over half the sixty-seven million cable households in the United States will be served by only three companies: Time Warner with 12.6 million; Comcast/MediaOne with 11.0 million; and TCI/AT&T with 10.7 million.⁴⁸ Driving this consolidation is the need to amass scale for new services like high-speed data, telephony, and video-on-demand. The word "cable" is hardly ever mentioned any more. The buzzword of the moment is "broadband communications" allowing the cablecos to compete effectively against the big telcos in providing high-speed Internet services.

For the competition/anti-trust regulator, this development creates a dilemma. On the one hand, it seems that the U.S. cable industry is now gearing up to provide effective competition to the telcos represented by the regional Bell operating companies plus AT&T, MCI, and Sprint. Much the same thing is occurring in Canada, where Rogers, Shaw, Videotron, and Cogeco account for well over seventy percent of cable subscribers and are positioning themselves to take on the four largest telcos: Bell Canada, BCT.Telus Communications, AT&T Canada, and Call-Net/Sprint Canada. On the other hand, cable and DTH are still viewed by many as discrete conventional industries delivering distant television signals and specialty channel programs into the home as a type of utility enjoying a form of monopoly in its franchised area. In Canada, the apparent convergence between cable/DTH and telecom is being closely monitored and regulated by the CRTC which has jurisdiction over both, admittedly from a different legislative base.

⁴⁶ See Rebecca Buckman, *After the Chat, Where to Place the Trade?*, WALL ST. J., Mar. 18, 1999, at B19.

⁴⁷ See Rebecca Buckman & Susan Pulliam, *Stock Chat Room Trading-places.net Is Focus of Probe*, WALL ST. J., Mar. 23, 1999, at C20.

⁴⁸ In the time since the conference, AT&T topped Comcast's bid and acquired MediaOne for \$56 billion. See Sallie Hofmeister, *Comcast Drops Out of Bidding for MediaOne*, L.A. TIMES, May 5, 1999, at C1.

What sort of regulatory coordination exists in the United States at the FCC? Or is this something best left to market forces in the face of rapid technological change?

C. Music Piracy on the Internet

Retail music sales to the eighteen-to-twenty-four-year-old market are plummeting. The main culprit appears to be the thousands, if not millions, of digital pirates in the United States and Canada who use a readily available and free software format called "MP3" to receive and send music over the Internet. The pirated tunes have sound quality comparable to that of CDs and can even be channelled through conventional stereo systems. The MP3 format permits Internet users to download files rapidly (by reducing a forty-megabyte audio track file to a mere 3.75 megabytes, for example), and to enjoy digital CD-quality sound whenever the files are accessed using an MP3 player. Unlike tapes or CDs, MP3 files do not exist in the physical sense – MP3 simply makes formerly unmanageable quantities of data compact enough to store easily in specialized playback systems.⁴⁹ Playback is not limited to the home – miniature hand-held and car-stereo units are readily available. RIO and MP3Man hand-held units cost approximately \$150-\$200 (U.S.), and prices are dropping. One manufacturer of RIO players, Diamond Multimedia, is selling about 20,000 units a month.⁵⁰ The hand-held models are loaded with about an hour's worth of music, which can be replaced as often as the listener desires.

Not surprisingly, MP3 software is available on sites across the Internet, on homepages around the world – in a number of European countries, Canada, Russia, China, and the United States. MP3 technology is so widespread that a March 5, 1999 search of the term "MP3" resulted in 1,555,853 hits using the AltaVista search engine. The Hotbot engine actually includes an MP3 checkbox on its primary search page.

There are numerous legitimate uses for the technology – the sale of hit singles, "teaser" advertising programs, and the exposure of a broad variety of new artists to a very large audience are three obvious examples. However, the Recording Industry Association of America (RIAA) and the Canadian Recording Industry Association (CRIA) view MP3 technology as a serious threat. Piracy is endemic, and RIAA and CRIA are focussing a significant

⁴⁹ For a useful overview of the technology, see Andrew Flynn, *MP3 the Internet Herald's Audio Revolution*, (visited Aug. 17, 1999) <<http://interactive.cfra.com/1999/03/04/97099.html>>.

⁵⁰ Rick Lockridge, CNN Interactive: *Music for the New Millennium is Bypassing Record Industry* (visited Aug. 17, 1999) <<http://www.cnn.com/TECH/computing/9903/02/webmusic.carry/>>.

percentage of their resources on restraining the activities of the increasing number of Web sites which permit browsers to download music for free, in violation of U.S.⁵¹ or Canadian law⁵² and international treaty provisions.⁵³ Globally, unauthorized downloading from "pirate sites" using MP3 compression has been estimated to cost the industry the equivalent of one billion dollars in lost sales,⁵⁴ although this figure has been challenged. To put this amount into perspective, online sales are predicted to reach four billion dollars a year by 2002.⁵⁵

The recording industry is actively seeking a technical solution in conjunction with IBM with the announcement last month of the "Madison Project" that will be testing a method for secure transfer of music files on-line that is intended to prevent copyright infringement.⁵⁶ But this project relies on the widespread availability of broadband cable television modems that have larger capacities than regular phone lines and, therefore, the project is a few years away from becoming anything like a household reality. And the project still requires consumers to imprint their own CDs at home, something that, not surprisingly, represents another way of selling CDs at regular retail prices.

Is the new MP3 technology good or bad for the record industry in the long run, given that there are now millions of young music fans throughout the world already in the habit of getting their music on-line? Can the industry convert everyone back to a "pay to play" mode? Does the technology help emerging young artists break their songs more quickly and effectively by going to the market directly rather than being held up for ransom by the major record companies who traditionally controlled access to consumers through distribution to record stores and record clubs?

⁵¹ See Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512 (1998); Digital Performance Right in Sound Recordings Act of 1995, 17 U.S.C. § 114 (1995).

⁵² See Bill C-32, *supra* note 21.

⁵³ See Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221; World Intellectual Property Organization Copyright Treaty, adopted at Geneva, Dec. 20, 1996, 36 I.L.M. 65 (1997); World Intellectual Property Organization Performances and Phonograms Treaty, adopted at Geneva, Dec. 20, 1996, 36 I.L.M. 76 (1997).

⁵⁴ See Canadian Recording Industry Association, No. 2079, Final Submissions in Respect of the Second Phase of the CRTC's New Media Forum, Feb. 8, 1999, at 6, *available at* <http://www.crtc.gc.ca/eng/proc_br/notices/1998/1998-82-3e.htm>.

⁵⁵ See Karl Taro Greenfeld, *You've Got Music!*, TIME, Feb. 22, 1999, at 58.

⁵⁶ See IBM, *Sony Forge Deal to Align Technologies For Music on the Web*, WALL ST. J., Apr. 16, 1999, at B5.

D. Betting the Future on Music Sales On-Line

Two major record companies who have apparently embraced on-line sales are Universal Music and BMG Entertainment.⁵⁷ Just last week they announced a joint Internet venture to promote each company's artists selling compact discs and eventually enabling consumers to download their favorite CDs in digital format. The Universal/BMG long-term strategy seems to be to move more rapidly into digital downloading in a consumer-friendly way that will make the sort of piracy permitted by the use of the MP3 software somewhat irrelevant. However, initially the Universal/BMG joint venture called "Get Music" will operate in a more conventional way, facilitating Internet purchases by mail order and directing consumers to their nearest retail outlet where Universal/BMG products are sold.⁵⁸

Other major record companies are also moving into on-line sales. Warner Music and Sony Music recently created their own on-line music store called "Total E."⁵⁹ Just last week, Canada's leading music retailer HMV (which is owned by EMI) confirmed that it will begin selling on-line in an effort to expand significantly the \$1.4 billion recorded music business. HMV's Canadian site will be launched in June offering 300,000 titles by Canadian artists.⁶⁰ Eventually, consumers will have access to about 2.5 million titles once sister sites in Britain, Japan, and elsewhere are launched.

Will Internet sales of music turn conventional music retailing on its head? Or will it simply facilitate additional sales? Certainly if the book retailing industry sets any parallel example, the experience of Amazon.com would suggest a win-win scenario. That on-line retailer reported 6.2 million individual accounts by the end of 1998, up from 1.5 million a year earlier. Repeat customers represent more than sixty percent of orders.⁶¹ Broadcast.com has signed a deal which gives Amazon.com exclusive book and music selling

⁵⁷ Universal became the world's biggest music company last year after its parent, Seagrams, acquired Polygram NV. The combined entity controls about 43% of the 13 billion dollar U.S. music market with sales of almost one billion CDs. See Dave McNary, *Music Mega-Deal: Seagrams Buys No. 1 Polygram*, L.A. DAILY NEWS, May 22, 1998, at B1.

⁵⁸ See Alice Rawsthorn, *Universal, BMG Going Global With Internet Music Sales Venture*, NAT'L POST, June 11, 1999, at C6.

⁵⁹ See Michael Broadhurst, *Making the Sale – Dancing to a New Tune: Is the Web a Godsend for Music Clubs?*, WALL ST. J., Dec. 7, 1998, at R27. To access the Total E Homepage, see Total E (visited Aug. 18, 1999) <<http://www.totalE.com/t2/cgis/index.cgi?tesid=54ceb49903f744a71325167b64e5f582>>.

⁶⁰ See HMV Homepage (visited Aug. 18, 1999) <<http://www.hmv.co.uk/hmvuk/realhome.asp?>>.

⁶¹ See Amazon.com Announces Financial Results for Fourth Quarter 1998, Press Release, Jan. 26, 1999 (visited Aug. 17, 1999) <<http://www.amazon.com/exec/obidos/subst/misc/1998-fourth-quarter-press-release.html>>.

rights on its Web site. This site, which attracts some 520,000 users a day, features live broadcasts of around 370 radio stations and thirty television stations.⁶²

To promote her upcoming tour in Canada, singer Alanis Morissette established a Web site permitting her fans to download one of her current hits in return for providing registration information. Those who register will also have the opportunity to link to Ticketmaster to pre-order up to four concert tickets.

Finally, Internet search engine Lycos, Inc. has launched a new service called "MP3 Search" that will provide links to more than 500,000 on-line songs to users who search by key word. Lycos will provide the music links through a joint venture with Fast Search and Transfer, a Norwegian company specializing in image and video compression technologies for the Internet. Lycos says that Fast Search has the largest on-line database of MP3 audio files and that the database will be updated hourly to minimize dead links. However, Lycos states that it will only be providing links to the recordings and will not be maintaining the actual database. Therefore, its search engine will not distinguish between legal and illegal recordings.⁶³

Are there legal tools or regulatory techniques that could be employed to ensure that on-line sales of music do not facilitate widespread piracy and properly reward creators under relevant copyright laws? Is there any role for broadcasting or telecommunications "regulatory jurisdiction" over Internet service providers particularly in requiring incumbent telephone and cable companies to provide standardized high speed network access circuits? Is this an area where an industry code of conduct might be useful as a means of providing safeguards to both creators and consumers while at the same time maintaining a healthy competition among the record companies?

E. Does the Internet Challenge the Future of the Conventional Magazine Industry?

In both Canada and the United States, the sale of books, both fiction and non-fiction, continues to grow exponentially. Maybe this is due to new and efficient mass retailers such as Chapters and Indigo in Canada, and Borders, Barnes & Noble, and WalMart in the United States. Or maybe it is because of the enhanced value to the industry provided by on-line sales through the

⁶² See Broadcast.com and Amazon.com Announce E-Commerce Agreement, Press Release, Dec. 1, 1998 (visited Aug. 17, 1999) <<http://www.broadcast.com/about/press/amazon.stm>>.

⁶³ See Lycos and Fast Rock the Web With the World's Largest MP3 Internet Music Directory, Press Release, Feb. 1, 1999 (visited Aug. 17, 1999) <<http://www.lycos.com/press/fandt.html>>.

likes of Amazon.com who have effectively used cyberspace to target specialized purchasers. Or maybe in this information age, more creative stories are being written, more useful information is being provided, and people simply have the capacity and means to absorb more. But there is still a certain irony in the fact that the Internet appears to have facilitated, not diminished, book sales in both Canada and the United States.

Is the same true for magazines? Sure, *TIME*, *Maclean's*, and other magazines have their own on-line marketing services to facilitate new or renewal subscriptions. But *Maclean's* is now on-line with all the articles featured in the current issue of the magazine on the Sunday night *before* the printed magazine hits the newsstands or is received by mail on Monday or Tuesday. All subscribers have to do is to key in their account number from their current magazine label, with on-line features being available as long as the person is a current paid subscriber. If this form of accessing magazine articles proliferates, what is the future of printed magazines as we know them? This is quite different from books which, for the most part, will always be consumed through the printed page, given their size, volume, and nature. But magazine articles featuring photographs and short feature items lend themselves to presentation on the Internet.

There is a certain irony in all of this because of the current battle raging between the Canadian and U.S. governments over Bill C-55 prohibiting advertising in split-run magazines in Canada. The bill may be quite irrelevant if consumers opt to obtain their magazines on the Internet. Imagine trying to adapt something like Bill C-55 to the sale of advertising on a Web site providing magazine articles.

Even more ironically, it was a small technological change occurring in the mid-1980s which initially precipitated the Canada/U.S. dispute over magazines. *TIME Canada* was established in 1943 and has put out a weekly Canadian edition printed in Canada ever since. It began transmitting its editorial content into Canada via satellite on or about 1985 and joining it up with locally sold Canadian advertisements at the Canadian printing plant, thereby avoiding the then-existing customs tariff.

In the early 1990s, *TIME Canada* invited its sister publication, *Sports Illustrated*, to establish a Canadian edition using the same satellite technology and Canadian printing facilities. Notwithstanding that such a move was perfectly legal under both the Investment Canada Act and the Excise Tax Act, the domestic magazine publishers raised a ruckus in Ottawa causing the government to introduce in 1995 an eighty percent tax on the cost of advertising in split-run periodicals lest hordes of American magazines come pouring across the border. However, the USTR challenged this measure at the World Trade Organization in 1996-97 and was successful. The WTO also struck

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down the customs tariff as well as discriminatory postal rates. Last fall, the government introduced Bill C-55 as a substitute preferring total prohibition with criminal sanctions on the sale of Canadian ads in split-runs rather than an eighty-percent tax.⁶⁴

Whether or not Canada succeeds in enacting this draconian measure (which is now before the Canadian Senate) and whether or not there is U.S. trade retaliation under NAFTA, I would submit that the whole exercise is more about symbols and precedents than substance. It is really a solution in search of a problem, and will be ultimately rendered irrelevant by the Internet.

IV. THE LONG-TERM IMPACT OF TECHNOLOGICAL CHANGE ON REGULATORY MODELS FOR INFORMATION, COMMUNICATIONS, AND ENTERTAINMENT

In conclusion, I would like to make six very brief statements regarding the long-term impact that technological change will have on our regulatory schemes in Canada and the United States.

Regulators will find that the Internet is best left to self-regulation, particularly through the autonomous adoption of industry codes of conduct on a cross-border basis.

Regulators can facilitate close cooperation among industry groups in developing codes of conduct and in suggesting remedial legislation dealing with criminal matters and securities and consumer fraud to respond to blatantly illegal uses of the Internet.

It would be futile and counterproductive for Canadian policy makers to institute regulatory mechanisms to ensure minimum Canadian content. There are no "natural monopoly" or "spectrum scarcity" issues with the Internet. It is effectively infinite. The only constraints are technological – essentially the limited availability of the broadband net limiting download speed for the majority of users.

Canadian policy makers should avoid attempting to achieve cultural policy objectives through regulation of the Internet. This would simply create an unfortunate regulatory imbalance between Canada and the rest of the world, creating disincentives for Internet companies to locate and operate in Canada.

Similarly, regulators on both sides of the border should approach copyright issues in a cooperative vein looking for both technical and legal solu-

⁶⁴ See Canada – Certain Measures Concerning Periodicals, Report of the Appellate Body, WT/DS31/AB/R, June 30, 1997; Canada – Certain Measures Concerning Periodicals, Panel Report, WT/DS31/R, Mar. 14, 1997; Bill C-55, *supra* note 24.

tions in consultation with representatives of the distribution and creator industries.

Consumer privacy issues, such as those addressed in Bill C-54, the proposed Personal Information Protection and Electronic Documents Act in Canada,⁶⁵ deserve close and careful attention on both sides of the border. Suffice it to say here that a balance must be struck in both Canada and the United States in facilitating international E-commerce transactions and creating a complaint-drive system to provide Internet users with appropriate privacy rights.

In the final analysis, the Internet by its very nature defies regulation, except at the fringes involving pornography, hate literature, and consumer fraud. And when you come down to it, is that not a part of the allure and excitement of it all? Some might call it the democratization of information, communication, and entertainment. Is there anything wrong with that?

⁶⁵ See Bill C-54, *An Act to support and promote electronic commerce by protecting personal information that is collected, used, or disclosed in certain circumstances, by providing for the use of electronic means to communicate or record information or transactions and by amending the Canada Evidence Act, the Statutory Instruments Act, and the Statute Revision Act*, 1st Sess., 36th Parl., 1988 (1st reading 1 Oct. 1998).

